

***UNITED STATES - COUNTERVAILING DUTIES
ON CERTAIN CORROSION-RESISTANT CARBON
STEEL FLAT PRODUCTS FROM GERMANY***

WT/DS213

**FIRST WRITTEN SUBMISSION
OF THE
UNITED STATES OF AMERICA**

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I. INTRODUCTION

1. The crux of the EC's case that is properly before the Panel consists of allegations that the U.S. countervailing duty law, as well as the sunset review determination in certain corrosion-resistant carbon steel flat products from Germany based upon that law, are inconsistent with the Agreement on Subsidies and Countervailing Measures (SCM Agreement) because: (1) the U.S. Department of Commerce ("Commerce") automatically initiates sunset reviews without first gathering evidence regarding the continuation or recurrence of subsidization; and (2) Commerce does not apply the SCM Agreement's *de minimis* standard for countervailing duty investigations to sunset reviews. With respect to the first claim, the EC argues that the Panel should read into Article 21.3 – the provision of the SCM Agreement that deals with sunset reviews – the requirements of Article 11.6. With respect to the second claim, the EC argues that the Panel should read into Article 21.3 the requirements of Article 11.9.

2. The EC's claims, however, run afoul of a basic principle of treaty interpretation. As stated by the Appellate Body in *India Patent Protection*, "the principles of treaty interpretation set out in Article 31 of the *Vienna Convention* . . . neither require nor condone the imputation into a treaty of words that are not there . . ." ¹ This is precisely what the EC is asking the Panel to do here; impute into Article 21.3 of the SCM Agreement "words that are not there." Under the principle articulated in *India Patent Protection*, the EC's claims must fail.

3. The EC tries to overcome this problem by repeatedly asserting that sunset reviews are "exceptions" to some other principle and, thus, must be interpreted in such a manner as to read into Article 21.3 "words that are not there." As discussed below, sunset reviews are not "exceptions" to something else, but instead are merely one part of an overall balance of rights and obligations negotiated during the Uruguay Round. However, even if one were to treat the provision on sunset reviews as an "exception" to something else, The EC's arguments run afoul of a different principle, which is that "merely characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted . . . by applying the normal rules of treaty interpretation." ² As already noted, one of the normal rules of treaty interpretation is that a treaty interpreter cannot read into a treaty "words that are not there." Thus, under the principle articulated by the Appellate Body in *EC Hormones*, the EC's claims still must fail.

4. In the remainder of this submission, the United States will rebut in detail the specific arguments made by the EC. However, when considering the minutiae of the EC's specific arguments, the United States urges the Panel to keep in mind the essence of what the EC is asking the Panel to do; namely, to read into the SCM Agreement "words that are not there."

¹ *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("India Patent Protection"), WT/DS50/AB/R, Report of the Appellate Body adopted 16 January 1998, para. 45.

² *EC Measures Concerning Meat and Meat Products (Hormones)* ("EC Hormones"), WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 104.

II. FACTUAL BACKGROUND

5. The EC's claims relate to the U.S. sunset review system "as such", as well as the specific sunset review determination by Commerce involving corrosion-resistant carbon steel flat products from Germany. In order to facilitate the Panel's understanding of the issues raised by the EC, the United States first will provide an overview of the U.S. sunset review system, followed by a discussion of the specific sunset review determination at issue.

A. Sunset Reviews Under U.S. Law

1. The Statute

6. In 1995, the United States amended its countervailing duty statute to include provisions for the conduct of five-year, or so-called "sunset," reviews of countervailing duty measures, including countervailing duty orders.³ As amended, Commerce and the United States International Trade Commission ("USITC") jointly conduct sunset reviews pursuant to sections 751(c) and 752 of the Act.⁴ Commerce has the responsibility of determining whether revocation of a countervailing duty order would be likely to lead to continuation or recurrence of subsidization, whereas the USITC has the responsibility of determining whether revocation of a countervailing duty order would be likely to lead to continuation or recurrence of injury.⁵

7. Pursuant to section 751(d)(2) of the Act, a countervailing duty order must be revoked after five years unless Commerce and the USITC make affirmative determinations that subsidization and injury would be likely to continue or recur.⁶ Under the statute, Commerce automatically initiates a sunset review on its own initiative within five years of the date of

³ The U.S. countervailing duty and antidumping duty statute is found in title VII of the Tariff Act of 1930, as amended ("the Act"), 19 U.S.C. 1671 *et seq.* Title II of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994), amended title VII in order to bring it into conformity with U.S. obligations under the SCM Agreement and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"). Concurrent with the passage of the URAA, Congress approved and published a "Statement of Administrative Action" (or "SAA"). H.R. Doc. No. 316, 103d Cong., 2d Sess., Vol. 1 (1994). The SAA is a type of legislative history which, under U.S. law, provides interpretive guidance in respect of the statute. See *United States - Measures Treating Export Restraints as Subsidies ("U.S. Export Restraints")*, WT/DS194/R, Report of the Panel adopted 23 August 2001, paras. 8.99-8.100 (discussing the status in U.S. law of the SAA).

The United States also notes that the term "countervailing duty order" is the U.S. law equivalent of the term "definitive duty" in the SCM Agreement.

⁴ Sections 751(c) and 752 of the Act (Exhibit EC-13).

⁵ Under the U.S. countervailing duty law, the term "revocation" is equivalent to the concept of "expiry of the duty" as used in Article 21.3 of the SCM Agreement.

⁶ Section 751(d)(2) of the Act (Exhibit EC-13).

publication of a countervailing duty order.⁷ Thereafter, a review can follow one of three basic paths.

8. First, if no domestic interested party responds to the notice of initiation, Commerce will revoke the order within 90 days after the initiation of the review.⁸

9. Second, if the response to the notice of initiation is “inadequate,” Commerce will conduct an expedited sunset review and issue its final determination within 120 days after the initiation of the review.⁹

10. Third, if the response to the notice of initiation is adequate, Commerce will conduct a full sunset review and issue its final determination within 240 days after the initiation of the review.¹⁰ Commerce normally will consider the response to the notice of initiation to be adequate where it receives complete responses from a domestic interested party, respondent interested parties accounting on average for more than 50 percent of the total exports of subject merchandise and, in the context of a sunset review of a countervailing duty order, the foreign government.¹¹

11. In both expedited and full sunset reviews, respondent interested parties may elect to waive participation in the sunset review conducted by Commerce, without prejudice to participation in the sunset review conducted by the USITC.¹² The purpose of this procedure is to avoid forcing respondent interested parties to incur the time and expense of participating in the Commerce side of a sunset review when they wish only to contest the likelihood of continuation or recurrence of injury.

12. As mentioned above, Commerce has the responsibility of determining whether revocation of a countervailing duty order would be likely to lead to continuation or recurrence of subsidization.¹³ If Commerce’s determination is negative – *i.e.*, if Commerce finds that there is no such likelihood – Commerce must revoke the order.¹⁴ However, if Commerce’s determination is affirmative, Commerce transmits its determination to the USITC, along with a

⁷ Sections 751(c)(1) and (2) of the Act (Exhibit EC-13); *see also* 19 CFR 351.218(c)(1) (Exhibit EC-14).

⁸ Section 751(c)(3)(A) of the Act (Exhibit EC-13). The term “domestic interested parties” is a shorthand expression for the interested parties defined in section 771(9)(C)-(G) of the Act. These are the types of interested parties who are eligible to file a petition for the imposition of countervailing duties.

⁹ Section 751(c)(3)(B) of the Act (Exhibit EC-13).

¹⁰ Section 751(c)(5)(A) of the Act (Exhibit EC-13).

¹¹ 19 CFR 351.218(e)(1) (Exhibit EC-14). The term “respondent interested parties” is a shorthand expression for the interested parties defined in section 771(9)(A)-(B) of the Act. These parties typically consist of foreign manufacturers, producers or exporters, or the U.S. importer of subject merchandise, or an association of such persons.

¹² Section 751(c)(4)(A) of the Act (Exhibit EC-13).

¹³ Section 752(b) of the Act (Exhibit EC-13).

¹⁴ Section 751(d)(2) of the Act (Exhibit EC-13).

determination regarding the magnitude of the net countervailable subsidy that is likely to prevail if the order is revoked.¹⁵

13. Under the statute, the applicable *de minimis* standard in sunset reviews is the same as the standard in reviews conducted pursuant to sections 751(a) and section 751(b)(1) of the Act.¹⁶ The statute itself does not set forth the *de minimis* standard for reviews,¹⁷ but the SAA clarifies the intent of Congress and the Administration that Commerce continue to apply to reviews the pre-URAA standard of 0.5 percent *ad valorem*. As discussed below, Commerce has fulfilled this intent by means of its regulations.

2. The Regulations

14. Following the enactment of the URAA, Commerce commenced a rulemaking proceeding with the ultimate objective of revising its antidumping (“AD”) and countervailing duty (“CVD”) regulations so as to bring them into conformity with the URAA.¹⁸ The rulemaking proceeding began on January 3, 1995, when Commerce published a notice requesting public suggestions as to what Commerce’s new AD/CVD regulations should contain.¹⁹

15. On May 19, 1997, Commerce published final AD/CVD regulations.²⁰ The regulations set out substantive provisions with respect to antidumping proceedings,²¹ as well as procedural provisions applicable to both antidumping and countervailing duty proceedings. These

¹⁵ Section 752(b) of the Act (Exhibit EC-13).

¹⁶ Section 752(b)(4)(B) of the Act (Exhibit EC-13); the parallel provision with respect to sunset reviews involving antidumping duty orders appears at section 752(c)(4)(B). A review under section 751(a) is typically referred to as an “administrative review.” An administrative review has aspects of the review contemplated by Article 21.2 of the SCM Agreement, as well as the “assessment proceeding” referred to in footnote 52 of the SCM Agreement. A review under section 751(b)(1) of the Act is typically referred to as a “changed circumstances” review, and corresponds to the review contemplated by Article 21.2.

¹⁷ There is no dispute in this case regarding the statutory *de minimis* standard applicable to countervailing duty investigations.

¹⁸ Where, as in the case of the U.S. countervailing duty law, Congress entrusts an administrative agency with the administration of a statute, it is common for the agency to promulgate regulations that elaborate on, or clarify, the statute. While regulations are subordinate to the statute, they typically have the force of law where they are validly promulgated and are not inconsistent with the statute.

¹⁹ *Advance Notice of Proposed Rulemaking and Request for Public*, 60 FR 80 (January 3, 1995).

²⁰ *Antidumping Duties; Countervailing Duties; Final Rule (“AD/CVD Final Rule”)*, 62 FR 27296 (May 19, 1997).

²¹ Commerce also commenced a rulemaking proceeding to consider substantive provisions related to countervailing duty proceedings, and issued final regulations on November 25, 1998. See *Countervailing Duties; Proposed Rule*, 62 FR 8818 (February 26, 1997); and *Countervailing Duties; Final Rule (“CVD Final Rule”)*, 63 FR 65348 (November 25, 1998). This rulemaking did not address sunset reviews.

regulations contained minimal guidance with respect to sunset reviews, essentially setting forth only the time frame for initiation and completion of such reviews.²²

16. In 1998, Commerce issued additional regulations addressing in greater detail the procedures for participation in, and conduct of, sunset reviews.²³ Given that over 300 pre-URAA orders (referred to as “transition orders”)²⁴ were eligible for revocation by January 1, 2000, Commerce needed to create a framework that would both implement statutory requirements and provide a clear, transparent process. The resulting *Sunset Regulations* did just that, setting forth, *inter alia*, the information to be provided by parties participating in a sunset review²⁵ and the deadlines for required submissions.²⁶

17. With respect to information requirements, the *Sunset Regulations* describe specifically the information to be provided by all interested parties in a sunset review.²⁷ In addition, the regulations invite parties to submit, with the required information, “any other relevant information or argument that the party would like [Commerce] to consider.”²⁸ These regulations constitute the standard request for information in sunset reviews and function as the standard questionnaire.

18. With respect to deadlines for required submissions, the *Sunset Regulations* provide that substantive responses to a notice of initiation are due 30 days after the date of publication in the *Federal Register* of the notice of initiation.²⁹ Rebuttal to a substantive response is due five days after the date the substantive response is filed.³⁰ The regulations also state that Commerce normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired.³¹

3. The Schedule for Sunset Reviews of Pre-URAA Orders

19. Article 32.4 of the SCM Agreement provides that in the case of Members, such as the United States, whose pre-URAA countervailing duty law did not include a sunset review

²² *AD/CVD Final Rule*, 62 FR at 27397 (codified at 19 CFR 351.218).

²³ *Procedures for Conducting Five-year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders (“Sunset Regulations”)*, 63 FR 13516 (March 20, 1998), codified in 19 CFR part 351.

²⁴ See section 751(c)(6)(C) of the Act (Exhibit EC-13). The countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany, published on August 17, 1993 (*i.e.*, pre-URAA), is a transition order.

²⁵ 19 CFR 351.218(d)(3) (Exhibit EC-14).

²⁶ 19 CFR 351.218(d)(3)-(4) (Exhibit EC-14).

²⁷ See 19 CFR 351.218(d)(1)-(4) (Exhibit EC-14).

²⁸ 19 CFR 351.218(d)(3)(iv)(B) (Exhibit EC-14).

²⁹ 19 CFR 351.218(d)(3)(i) (Exhibit EC-14).

³⁰ 19 CFR 351.218(d)(4) (Exhibit EC-14).

³¹ 19 CFR 351.218(d)(4) (Exhibit EC-14).

procedure, pre-URAA countervailing duty measures shall be deemed to be imposed on a date not later than the date of entry into force for that Member of the WTO Agreement. The United States implemented Article 32.4 through section 751(c)(6) of the Act, which establishes special scheduling rules for so-called “transition orders.”³²

20. Given the large number of transition orders – including the order on certain corrosion-resistant carbon steel flat products from Germany – eligible for a sunset review by January 1, 2000, Commerce and the USITC jointly developed a sunset review initiation schedule. In developing the schedule, the USITC, in consultation with Commerce, grouped antidumping and countervailing duty orders, findings, and suspended investigations involving the same domestic like product or involving related like products. The groups were placed in chronological sequence based on the average date of the group.³³ The list was then divided to provide for monthly initiations beginning in July 1998.

21. After considering comments on a proposed initiation schedule, Commerce published the final sunset initiation schedule on May 14, 1998.³⁴ The final schedule identifies qualifying antidumping and countervailing duty orders, findings, and suspended investigations by product, country, USITC case number, Commerce case number, and effective date, and indicates the month of initiation of a sunset review for specific groups of transition orders.³⁵

22. The final sunset initiation schedule indicated that the sunset review of the countervailing duty order on corrosion-resistant steel would be initiated in September 1999.³⁶

23. Thus, with the applicable information requirements, deadlines, and initiation schedule published in the *Federal Register* by May 1998, the EC and German producers had *over 15 months to prepare* for the sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany.³⁷

³² Given that the date of entry into force of the WTO Agreement for the United States was January 1, 1995, a transition order is a countervailing duty order in effect as of January 1, 1995.

³³ The average date of the group was determined based on the effective date (month and year) of each order within a group.

³⁴ *Transition Orders; Final Schedule and Grouping of Five-Year Reviews*, 63 FR 26779 (May 14, 1998). Commerce republished the notice two week later due to typesetting errors. See 63 FR 29372 (May 29, 1998) (“*Sunset Initiation Schedule*”) (Exhibit US-1).

³⁵ Commerce also makes information related to sunset reviews available to the public on the internet at http://www.ita.doc.gov/import_admin/records/sunset/.

³⁶ *Sunset Initiation Schedule*, 63 FR at 29380 (Exhibit US-1).

³⁷ In April 1998, Commerce also issued a policy bulletin related to sunset reviews. *Policies Regarding the Conduct of Five-year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin (“Sunset Policy Bulletin”)*, 63 FR 18871 (April 16, 1998) (Exhibit EC-15). Under the U.S. law, the *Sunset Policy Bulletin* would be considered a non-binding statement, providing evidence of Commerce’s understanding of sunset-

B. Certain Corrosion-resistant Carbon Steel Flat Products from Germany

1. The Countervailing Duty Investigation and Order

24. On July 9, 1993, Commerce published its final affirmative countervailing duty determination on certain corrosion-resistant carbon steel flat products from Germany.³⁸ Three German producers of certain corrosion-resistant carbon steel flat products were investigated by Commerce: Hoesch Stahl AG (Hoesch), Preussag Stahl AG (Preussag), and Thyssen Stahl AG (Thyssen).

25. In its final determination, Commerce found that German producers of corrosion-resistant carbon steel flat products received countervailable benefits with respect to five programs,³⁹ as detailed below.

1. Capital Investment Grants (hereinafter "CIG"). The CIG program provided grants to reimburse a percentage of the acquisition cost of assets purchased or produced after July 1981 but prior to January 1986. Commerce determined that the benefits received under this program were non-recurring and calculated a net subsidy rate of 0.39 percent *ad valorem*. Commerce determined this rate by calculating the portion of the benefit

³⁷ (...continued)

related issues not explicitly addressed by the statute and regulations. In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent. See *U.S. Export Restraints*, paras. 8.120-8.129 (discussing the non-binding status of Commerce countervailing duty precedent). As with its administrative precedent, Commerce normally would follow its policy bulletin or explain why it did not do so. In the policy bulletin, Commerce indicated that normally it would determine that revocation of a countervailing duty order or termination of a suspended investigation would be likely to lead to a continuation or recurrence of a countervailable subsidy where (1) a subsidy program continues, (2) a subsidy program has been only temporarily suspended, or (3) a subsidy program has been only partially terminated. Commerce also included in the policy bulletin a non-exhaustive list of adjustments that may be made to the net countervailable subsidy to take into account determinations during administrative reviews.

³⁸ *Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany*, 58 FR 37315 (July 9, 1993) ("*Commerce Investigation Final*") (Exhibit EC-2).

³⁹ With respect to five other programs, Commerce also determined that German producers of corrosion-resistant carbon steel flat products used the programs but calculated net subsidies of zero for the subject merchandise. See *Commerce Investigation Final*, 58 FR at 37316-21 (Exhibit EC-2). Specifically, in its final determination, Commerce found that the following five programs were used by German producers, but that the countervailable benefit with respect to corrosion-resistant carbon steel flat products was zero: Investment Premium Act (used by Preussag); Joint Scheme: Improvement of Regional Economic Structure (grants received by Thyssen); Ruhr District Action Program (grants received by Thyssen); ECSC Article 54 Long-Term Loans (loans received by Hoesch, Preussag, and Thyssen); and Interest Rebates on ECSC Article 54 Loans (interest rebates received by Preussag and Thyssen). *Id.*

attributable to the period of investigation⁴⁰ and dividing the benefit by the total steel sales of the companies producing corrosion-resistant carbon steel flat products.⁴¹

2. Structural Improvement Aids. This program provided funds for companies in the iron and steel industry to cover severance pay and transitional assistance for steel workers affected by the restructuring plan within the industry and to assist steel companies with the costs associated with plant closures. Funds were provided to cover expenses incurred in laying off employees from the period January 1, 1980, through December 31, 1986. Funds were provided on a conditionally repayable, interest-free basis with repayment scheduled to begin in 1986. Because of the possibility of repayment, Commerce treated the funds as short-term zero interest rate loans, rolled-over each year until repayment. To calculate the benefit, Commerce took the amounts outstanding during the period of investigation and calculated the interest that would have been paid on those amounts at a commercial interest rate. Commerce then divided the resulting amount by the total steel sales of the companies producing corrosion-resistant carbon steel flat products. The resulting net subsidy rate was 0.05 percent *ad valorem*.⁴²

3. Special Subsidies for Companies in the Zonal Border Area. Under this program, German steel companies headquartered in the zonal border area were eligible to receive two types of benefits: special depreciation for investments in the zonal border area and freight assistance. To calculate the benefit, Commerce divided the tax savings under the program by the total sales of the companies producing corrosion-resistant carbon steel flat products. The resulting net subsidy rate was 0.01 percent *ad valorem*.⁴³

4. Aid for Closure of Steel Operations. This program, addressing economic and social costs associated with plant closings in the steel industry between 1987 and 1990, provided grants to the iron and steel industry for expenses incurred with respect to displaced employees and increased the amount of aid provided to employees who lost their jobs in iron, steel, and coal industries. In certain instances, companies repaid portions of the grants. Commerce determined that the benefits received under this program were non-recurring. With respect to the grants, Commerce calculated the portion of the benefit attributable to the period of investigation,⁴⁴ with respect to the repayable

⁴⁰ Commerce calculated the portion of the benefit attributable to the period by allocating the grants over the average useful life of assets in the industry. Commerce's allocation methodology, as it existed at that time, is described in its *General Issues Appendix*, 58 FR 37225, 37226-27 (July 9, 1993).

⁴¹ *Commerce Investigation Final*, 58 FR at 37316 (Exhibit EC-2).

⁴² *Commerce Investigation Final*, 58 FR at 37316-17 (Exhibit EC-2).

⁴³ *Commerce Investigation Final*, 58 FR at 37318 (Exhibit EC-2). Only Preussag received a benefit under this program during the period of investigation. *Id.*

⁴⁴ Commerce calculated the portion of the benefit attributable to the period by allocating the grants over the
(continued...)

amount of the grants, Commerce calculated the interest that should have been paid on the outstanding repayable portion of the grant. Commerce then added the benefits calculated from the grants and the interest savings and divided that sum by the total steel sales of the companies producing corrosion-resistant carbon steel flat products to arrive at a net subsidy rate of 0.06 percent *ad valorem*.⁴⁵

5. ECSC Redeployment Aid Under Article 56(2)(b). Under this program, the German Government made payments to persons who lost their jobs in the iron, steel and coal industries. Commerce determined that these payments relieved the steel companies of an obligation they would otherwise have had and found the benefits provided under this program to be recurring. Commerce divided an amount for funds provided by the German Government during the period of investigation by the total steel sales of the companies producing corrosion-resistant carbon steel flat products to arrive at a net subsidy rate of 0.08 percent *ad valorem*.⁴⁶

26. Based on the above five programs, Commerce calculated a country-wide total *ad valorem* countervailing duty rate of 0.59 percent.

27. On August 9, 1993, the USITC notified Commerce of its final affirmative determination that imports of certain corrosion-resistant carbon steel flat products from Germany were causing injury to the U.S. domestic industry.⁴⁷

28. On August 17, 1993, Commerce amended its final determination to correct a ministerial error and issued the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany.⁴⁸ Correcting the error in the final subsidy calculations increased the *ad valorem* countervailing duty rate by 0.01 percent, from 0.59 percent to 0.60 percent.⁴⁹

⁴⁴ (...continued)

average useful life of assets in the industry. See *General Issues Appendix*, 58 FR 37225, 37226-27 (July 9, 1993).

⁴⁵ *Commerce Investigation Final*, 58 FR at 37318-19 (Exhibit EC-2).

⁴⁶ *Commerce Investigation Final*, 58 FR at 37320-21 (Exhibit EC-2).

⁴⁷ USITC Pub. 2664 at 161 (August 1993) (Exhibit EC-3).

⁴⁸ *Countervailing Duty Orders and Amendment to Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany*, 58 FR 43756 (August 17, 1993) ("Amendment to Investigation Final and Order") (Exhibit EC-4).

⁴⁹ *Amendment to Investigation Final and Order*, 58 FR at 43758 (Exhibit EC-4).

2. The Sunset Review and Determination

29. On May 14, 1998, Commerce announced its intent to initiate the sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany in September 1999.⁵⁰

30. On August 26, 1999, Commerce notified representatives of the EC, the German Government, and German producers, including Hoesch, Preussag, and Thyssen, by mail, that the sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany would be initiated on or about September 1, 1999. In its letter, Commerce informed the parties of the applicable information requirements and the 30-day deadline (from the date of publication in the *Federal Register* of the sunset initiation notice) for submissions. In addition, Commerce suggested that parties consult the *Sunset Policy Bulletin* for guidance on methodological or analytical issues related to Commerce's conduct of sunset reviews.⁵¹

31. On September 1, 1999, Commerce published its notice of initiation of the sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany.⁵² In the published initiation notice, Commerce again highlighted the deadline for filing a substantive response in the sunset review⁵³ and the information to be contained in the response.⁵⁴ Commerce also explicitly referred parties to the applicable regulation for seeking an extension of filing deadlines.⁵⁵

⁵⁰ *Sunset Initiation Schedule* (Exhibit US-1).

⁵¹ "Letters from Commerce to Interested Parties," dated August 26, 1999 (Exhibit US-2).

⁵² *Initiation of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders or Investigations of Carbon Steel Plates and Flat Products ("Sunset Initiation")*, 64 FR 47767, 47768 (September 1, 1999) (Exhibit EC-5).

⁵³ The deadline for filing a substantive response in a sunset review is 30 days after the date of publication in the *Federal Register* of the notice of initiation. 19 CFR 351.218(d)(3)(i) (Exhibit EC-14).

⁵⁴ The information provisions with respect to substantive responses are set forth at 19 CFR 351.218(d)(3) (Exhibit EC-14).

⁵⁵ 19 CFR 351.302(c) provides that a party may request an extension of a specific time limit. 19 CFR 351.302(b) provides that unless expressly precluded by statute, Commerce may, for good cause, extend any time limit established by its regulations. The U.S. countervailing duty statute does not contain deadlines for submission of information in a sunset review.

32. By October 4, 1999, the EC, the German Government, German producers,⁵⁶ and domestic interested parties⁵⁷ filed their substantive responses.

33. In their substantive responses, the EC, the German Government, and the German producers argued that subsidy programs previously found countervailable in the investigation phase of the proceeding had been terminated, were not being used by German steel producers, or were not countervailable. They also argued that any benefits from those programs that continued to exist were *de minimis*.

34. In their substantive response, the domestic interested parties argued that certain subsidy programs found countervailable in the investigation phase of the proceeding continued to exist or to provide continuing benefits. In addition, the domestic interested parties made allegations concerning new subsidy programs providing benefits to the German steel industry.

35. The EC, the German Government, the German producers, and the domestic interested parties filed rebuttal comments on October 15, 1999. In their rebuttal comments, the German Government and the German producers argued that the domestic interested parties' allegations of new subsidy programs should not be considered in the context of a sunset review. In their rebuttal responses, the domestic interested parties maintained that Preussag reported receiving grants under the CIG as late as 1990.

36. On October 20, 1999, Commerce determined to conduct a full sunset review based on its receipt of complete substantive responses from the EC, the German Government, and German producers accounting for a significant portion of German exports to the United States.⁵⁸

37. On March 27, 2000, Commerce published its preliminary sunset determination finding likelihood of continuation or recurrence of subsidization.⁵⁹ In analyzing likelihood, Commerce considered whether a subsidy program continued and/or whether the benefit stream of a countervailable subsidy was likely to continue, regardless of whether the program that gave rise

⁵⁶ German producers, Thyssen Krupp Stahl AG, Stahlwerke Bremen GmbH, EKO Stahl GmbH, and Salzgitter AG, participated jointly in the sunset review of the countervailing duty order on corrosion-resistant carbon steel flat products from Germany.

⁵⁷ The domestic interested parties, Bethlehem Steel Corp., Ispat Inland Inc., LTV Steel Inc., National Steel Corp., and U.S. Steel Group, a unit of USX Corp., participated jointly.

⁵⁸ "Commerce Memorandum on Adequacy of Response to Notice of Initiation" dated 20 October 1999 (Exhibit US-3); *see also* 19 CFR 351.218(e)(1)(ii)(A)-(B) (Exhibit EC-14).

⁵⁹ *Certain Corrosion-Resistant Carbon Steel Flat Products, etc.; Preliminary Results of Full Sunset Reviews ("Commerce Sunset Preliminary")*, 65 FR 16176 (March 27, 2000) (Exhibit EC-6), and accompanying Decision Memorandum ("*Commerce Sunset Preliminary Decision Memorandum*") (Exhibit EC-7).

to such benefit continued to exist.⁶⁰ Based on its finding that benefit streams from non-recurring grants under the CIG program would continue beyond the five-year mark and that the Aid for Closure of Steel Operations and ESCS programs continue to exist,⁶¹ Commerce determined there was likelihood of continuation or recurrence of subsidization.

38. As required under U.S. law, Commerce also determined the net countervailable subsidy likely to prevail if the order were revoked.⁶²

39. As a general matter, and starting with the total *ad valorem* rate determined in the original investigation, Commerce considers whether, since the investigation, it has found subsidy programs to be terminated and/or new programs to be countervailable.⁶³ Based on findings, which normally are made in the context of administrative reviews under section 751(a) of the Act, Commerce may adjust the rate determined in the original investigation to take these subsequent findings into account.⁶⁴

40. Although no administrative reviews of the order on certain corrosion-resistant carbon steel flat products from Germany were ever conducted, Commerce agreed with the EC and the German producers that the Structural Improvement Aids and Special Subsidies for Companies in the Zonal Border Area programs had been terminated with no continuing benefits. Commerce, therefore, adjusted the net countervailable subsidy rate accordingly.⁶⁵ Because no administrative reviews had been conducted, Commerce did not consider the domestic interested parties' allegations concerning additional countervailable subsidies. For the same reason, Commerce did not recalculate the subsidy rates determined in the original investigation.⁶⁶ Based on this analysis, Commerce determined a net countervailable subsidy rate of 0.54 percent.⁶⁷

41. On August 2, 2000, Commerce published its final sunset determination finding likelihood of continuation or recurrence of subsidization.⁶⁸ Commerce addressed the parties' arguments, but did not change the basis for its likelihood from its preliminary determination, nor did it change its determination concerning the net countervailable subsidy likely to prevail.

⁶⁰ *Commerce Sunset Preliminary Decision Memorandum*, p.23 (Exhibit EC-7).

⁶¹ *Commerce Sunset Preliminary Decision Memorandum*, p.24-29 (Exhibit EC-7).

⁶² Section 752(b) of the Act (Exhibit EC-14).

⁶³ *See Sunset Policy Bulletin*, section III.B (Exhibit EC-15).

⁶⁴ *See Sunset Policy Bulletin*, section III.B (Exhibit EC-15).

⁶⁵ *See Sunset Calculation Memorandum*, p.1 (Exhibit EC-8).

⁶⁶ *Commerce Sunset Preliminary Decision Memorandum*, p.37 (Exhibit EC-7).

⁶⁷ *Sunset Calculation Memorandum*, p.1 (Exhibit EC-8).

⁶⁸ *Certain Corrosion-Resistant Carbon Steel Flat Products, etc.; Final Results of Full Sunset Reviews ("Commerce Sunset Final")*, 65 FR 47407 (August 2, 2000) (Exhibit EC-9), and accompanying Decision Memorandum ("*Commerce Sunset Final Decision Memorandum*") (Exhibit EC-10).

42. On December 1, 2000, the USITC published its determination that revocation of the countervailing duty order would be likely to lead to continuation or recurrence of injury.⁶⁹

43. On December 15, 2000, the United States published notice of the continuation of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany based on the decisions by Commerce and the USITC finding likelihood of continuation or recurrence of subsidization and injury.⁷⁰

III. PROCEDURAL BACKGROUND

44. On November 10, 2000, the EC requested consultations with the United States on Commerce's final results of the full sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany. The EC indicated that it considered Commerce's determination to be inconsistent with "the obligations of the United States under the SCM Agreement and, in particular, in breach of Articles 10, 11.9 and 21 (notably 21.3) thereof."⁷¹ The EC did not identify any other measure (*e.g.*, a provision of U.S. law) or type of proceeding (*e.g.*, expedited sunset reviews). Consultations were held on December 8, 2000.

45. On February 5, 2001, the EC requested further consultations with the United States. The EC indicated that it considered Commerce's procedures for self-initiation of sunset reviews, both as applied by Commerce in the sunset review measure in question and in general, to be inconsistent with the obligations of the United States under Articles 21.1, 21.3 and 32.5 of the SCM Agreement and Article XVI:4 of the Marrakesh Agreement.⁷²

46. On August 8, 2001, the EC requested the establishment of a panel. The EC indicated that it considered Commerce's sunset determination of August 2, 2000, and relevant provisions of U.S. legislation and regulations relating to self-initiation contained in section 751(c) of the Tariff Act of 1930 and Commerce's implementing regulations (62 FR 27296 (May 19, 1997)) and interim final regulations (63 FR 13516 (March 20, 1998)), to be inconsistent with the United States' obligations under the SCM Agreement and, in particular, Articles 10, 11.9, 21 (notably paragraphs 1 and 3), and 32.5 of the SCM Agreement and with Article XVI:4 of the Marrakesh Agreement.⁷³

⁶⁹ *Certain Carbon Steel Products from ... Germany ...*, 65 FR 75301 (December 1, 2000). The EC is not challenging the USITC likelihood of injury determination in this case. EC First Submission, para. 30, n.28.

⁷⁰ *Continuation of Antidumping and Countervailing Duty Orders on Certain Carbon Steel Products from [16 countries, including Germany]*, 65 FR 78469 (December 15, 2000).

⁷¹ WT/DS213/1 (20 November 2000).

⁷² WT/DS213/1/Add.1 (8 February 2001).

⁷³ WT/DS213/3 (10 August 2001).

47. On September 10, 2001, the DSB established a panel with the standard terms of reference.⁷⁴

IV. STANDARD OF REVIEW

48. With respect to disputes involving a determination made by a domestic authority based upon an administrative record, the Appellate Body, in *U.S. Cotton Yarn*, recently summarized the standard of review under DSU Article 11 as follows:⁷⁵

[P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.

The United States does not disagree with this standard.

49. The EC erroneously argues, however, that the Panel cannot “disregard or refuse to consider facts and evidence *submitted to it*” by the parties to the dispute.⁷⁶ The United States disagrees with the EC’s implication that a panel has unfettered discretion to consider any evidence in deciding the issues before it.

50. In particular, in assessing whether a determination by an investigating authority – such as Commerce’s determination in the sunset proceeding at issue here – is consistent with the SCM Agreement, the Panel must consider only the evidence that was before Commerce at the time it made its decision. To do otherwise would constitute *de novo* review of the sunset determination, not a review of whether the determination made by Commerce was consistent with the SCM Agreement.

51. The evidence before an investigating authority does not include evidence that was properly rejected by the investigating authority. As demonstrated in Section V.D.2 below, Commerce properly declined to consider the document the EC now argues the Panel should consider. Because the Appellate Body has indicated that it is not the Panel’s role to collect new

⁷⁴ WT/DS213/4 (15 November 2001).

⁷⁵ *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, Report of the Appellate Body adopted 5 November 2001, para. 74.

⁷⁶ EC First Submission, para. 37 (emphasis added).

data or to consider evidence which was not properly before Commerce when it made its determination, the Panel should decline to consider the document submitted by the EC.⁷⁷

V. SUBSTANTIVE ARGUMENT

A. The EC Bears the Burden of Proving Its Claims

52. It is now well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a violation.⁷⁸ If the balance of evidence and argument is inconclusive with respect to a particular claim, the EC, as the complaining party, must be found to have failed to establish that claim.⁷⁹

53. For the reasons discussed below, the United States believes that the EC has failed to meet its burden to establish a *prima facie* case. However, in the event the Panel should find to the contrary, we have rebutted the EC's claims below.

B. Automatic Self-Initiation of Sunset Reviews Is Consistent with the SCM Agreement

54. DSU Article 3.2 directs panels to "clarify" WTO provisions "in accordance with customary rules of interpretation of public international law." The Appellate Body has recognized that Article 31 of the Vienna Convention reflects a customary rule of interpretation. Article 31(1) provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms* of the treaty in their *context* and in the light of its *object and purpose*." (Emphasis added). In applying this rule, however, the Appellate Body has cautioned that an interpreter's role is limited to the words and concepts used in the treaty, and that the principles of interpretation set out in Article 31 "neither require nor condone the imputation into a treaty of words that are not there . . ." ⁸⁰ It goes without saying that a panel cannot "clarify" a treaty provision that does not exist.

55. Customary rules of treaty interpretation dictate that the words of a treaty form the starting point for the process of interpretation. There is no dispute that a sunset review, like the

⁷⁷ See *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS/184/R, Report of the Panel, as modified by the Appellate Body, adopted 23 August 2001, para. 7.7.

⁷⁸ See, e.g., *United States - Measures Affecting Imports of Woven Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, page 14; *EC Hormones*, para. 104; and *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, Report of the Panel, as modified by the Appellate Body, adopted 12 January 2000, para. 7.24.

⁷⁹ See, e.g., *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, Report of the Panel, as affirmed by the Appellate Body, adopted 22 September 1999, para. 5.120.

⁸⁰ *India Patent Protection*, para. 45.

Commerce sunset review at issue in this case, constitutes a “review” within the meaning of Article 21.3 of the SCM Agreement. Therefore, the Panel must begin its analysis with the text of Article 21.3, which provides:

Notwithstanding the provisions of paragraphs 1^[81] and 2^[82], any definitive countervailing duty shall be terminated on a date not later than five years from its imposition . . . , unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.⁵² The duty may remain in force pending the outcome of such a review.

⁵² When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

56. Pursuant to this provision, a definitive countervailing duty (“countervailing duty order” in U.S. parlance) must be terminated *unless* the requisite finding – likelihood of continuation or recurrence of subsidization and injury – is made.

57. Article 21.3 is a specific implementation of the general rule, found in Article 21.1 of the SCM Agreement, that a countervailing duty order shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.⁸³ Nothing in the general rule found in Article 21.1 suggests any presumption concerning how long countervailing duties may continue to be necessary – nor does Article 21.3, despite the EC’s suggestion to the contrary.

58. To the contrary, as recognized by a prior panel, the termination of a countervailing duty is conditional on the outcome of a sunset review.⁸⁴ In essence, Article 21.3 defines the point in

⁸¹ Paragraph 1 of Article 21 provides that “[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.”

⁸² Paragraph 2 of Article 21 is relevant to types of reviews, other than sunset reviews, such as countervailing duty assessment reviews. See, e.g., *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (“UK Lead Bar”), WT/DS138/AB/R, Report of the Appellate Body adopted 7 June 2000, para. 53.

⁸³ *United States - Anti-dumping Duty On Dynamic Random Access Memory Semiconductors (DRAMs) Of One Megabit Or Above From Korea* (“Korea DRAMs”), WT/DS99/R, Report of the Panel adopted 19 March 1999, para. 6.40 (discussing the parallel provision in the AD Agreement).

⁸⁴ *Korea DRAMs*, para. 6.48, n.494 (noting in the context of the parallel provision of the AD Agreement that termination of a definitive duty five years from its imposition “is conditional”). The conditional nature of

time (*i.e.*, after five years) at which the authorities must do one of two things: automatically terminate the countervailing duty order or take stock of the situation, *i.e.*, conduct a review to determine whether continuation or recurrence of subsidization and injury is likely.⁸⁵ If so, the duty continues to be necessary and may be maintained; if not, the duty must be terminated.

59. Moreover, even if one were to characterize a sunset review under Article 21.3 as some sort of “exception” to something else, the Appellate Body has stated that “describing [or] characterizing a treaty provision as an ‘exception’ does not by itself justify a ‘stricter’ or ‘narrower’ interpretation of that provision than would be warranted by . . . applying the normal rules of treaty interpretation.”⁸⁶

1. Article 21.3 Explicitly Authorizes Authorities to Initiate Sunset Reviews on Their Own Initiative

60. Article 21.3 authorizes authorities to initiate a sunset review “on their own initiative *or* upon a duly substantiated request made by or on behalf of the domestic industry” (emphasis added). This disjunctive language is unambiguous, and, under the customary rules of interpretation, must be read according to its ordinary meaning, which is that a Member may *either* self-initiate a sunset review or initiate a sunset review in response to a duly substantiated request.⁸⁷

61. According to the EC, Article 21.3 precludes authorities from initiating sunset reviews on their own initiative unless they are in possession of the same level of evidence that would be

⁸⁴ (...continued)

termination is underscored by the fact that Article 21.3 provides that the duty remains in force pending the outcome of the review.

⁸⁵ The EC’s reliance on *Brazil-Desiccated Coconut* is misplaced. EC First Submission, para. 72, citing *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/R, Report of the Panel, as upheld by the Appellate Body, adopted 20 March 1997, para. 277. The panel in that case recognized that measures in place prior to the entry into force of the SCM Agreement would be subject to the same sunset proceedings as those measures taken after entry into force. Thus, rather than establishing a presumption in favor of revocation, the panel simply recognized that Article 21.3 guarantees the right to a sunset review at a definite point in time.

⁸⁶ *EC Hormones*, para. 104.

⁸⁷ As the EC notes correctly, the United States automatically initiates sunset reviews on its own initiative within five years of the date of publication of an antidumping or countervailing duty order, a notice of suspension of an antidumping or countervailing duty investigation (as the result of an undertaking), a notice of injury determination with respect to a countervailing duty order involving a country that becomes a Subsidies Agreement country after issuance of the order (although not germane to this case, we note that the EC mischaracterizes this procedure as “a determination of injury in an administrative review”), or a determination pursuant to a sunset review to continue an order or undertaking, pursuant to section 751(c)(1) and (2) of the Act (19 USC 1675(c)(1) and (2)); *see also* 19 CFR 351.218(c)(1)). *See* EC First Submission, para. 46.

required in a “duly substantiated request” from the domestic industry.⁸⁸ However, there is nothing in the text of Article 21.3 to support the EC’s argument. The EC is attempting to read into Article 21.3 a requirement that is quite plainly not there.

62. As an initial matter, then, the right of an investigating authority to initiate a sunset review on its own initiative, as explicitly stated in Article 21.3, is unqualified. It is also without question that the Panel may not “diminish” this right.⁸⁹

2. Neither the Text Nor the Context of Article 21.3 Imposes Any Evidentiary Requirement on Authorities that Initiate Sunset Reviews on Their Own Initiative

63. Article 21.3 unambiguously states that the authorities may initiate a sunset review “on their own initiative.” Nothing in Article 21 modifies this phrase or introduces additional requirements for initiation. Had the drafters of the SCM Agreement so wished, they could easily have incorporated additional requirements for self-initiation.

64. Despite the plain language of Article 21.3, the EC argues that the Article 11.6 requirements for self-initiation of an investigation are applicable to self-initiation of sunset reviews.⁹⁰ The obvious flaw in the EC’s argument is that there is no reference to the Article 11.6 requirements in the text of Article 21.3 or vice versa.

65. Where the Members wished to have obligations set forth in one provision apply in another context, they did so expressly. Article 21 itself illustrates this point in paragraph 4, which makes the provisions of Article 12 applicable to Article 21.3 reviews, and paragraph 5, which expressly makes the provisions of Article 21 applicable to Article 18 undertakings. The only inference the Panel can draw, therefore, is that the Members chose not to incorporate the evidentiary requirements of Article 11.6, or any other provision, for self-initiation of sunset reviews.⁹¹

66. From the text of the Agreement, therefore, it is evident that there is no basis to read into Article 21.3 *any* self-initiation requirements, including a requirement that domestic authorities be in possession of the same level of evidence that would be required in a “duly substantiated

⁸⁸ EC First Submission, paras. 65-66.

⁸⁹ A panel “cannot add to or diminish the rights and obligations provided in the covered agreements.” Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), Article 19.2; *see also* Article 3.2 of the DSU.

⁹⁰ EC First Submission, paras. 63-65.

⁹¹ *See Japan - Taxes on Alcoholic Beverages* (“*Japan Taxes*”), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body adopted 4 October 1996, page 19 (discussing how the “omission” in Article III:2 of GATT 1994 to the general principle in Article III:1 “must have some meaning”).

request” from the domestic industry. The EC essentially admits as much by characterizing Article 11 as “context.”⁹² However, to the extent that Article 11 is considered as context for purposes of interpreting Article 21.3, such a consideration demonstrates that the drafters of the SCM Agreement knew how to draft self-initiation requirements and that they chose not to do so with respect to the self-initiation of sunset reviews under Article 21.3.

67. The SCM Agreement distinguishes between the investigatory phase and the review phase of a countervailing duty proceeding. Article 11 deals with investigations, while Article 21 deals with reviews. This structure is reflected in other provisions of the SCM Agreement. For example, Articles 22.1 through 22.6 set forth obligations concerning the contents of public notices issued during an investigation, while Article 22.7 sets forth comparable obligations with respect to reviews. Likewise, Article 32.3, which is a transition rule, distinguishes between “investigations” and “reviews of existing measures.”⁹³

68. Article 11 is entitled “Initiation and Subsequent Investigation.” As the panel in *Korea DRAMs* concluded, “the term ‘investigation’ means the investigative phase leading up to the final determination of the investigating authority.”⁹⁴ There is nothing in the text of Article 11 that suggests that the provisions of that article, including Article 11.6, apply to anything other than the investigation phase of a countervailing duty proceeding. Indeed, the text of Article 11.6 expressly states that the particular provision, like Article 11 in general, deals only with the investigation phase.⁹⁵

69. The EC’s arguments, therefore, find no support under customary rules of treaty interpretation. Article 21.3 explicitly provides for initiation of sunset reviews on an authority’s own initiative. Furthermore, nothing in the text of Article 21.3, or Article 11.6, imposes any evidentiary requirements on authorities who initiate sunset reviews on their own initiative. It is impossible to violate an obligation that does not exist. Therefore, the United States’ automatic initiation of sunset reviews is not inconsistent with the SCM Agreement.

⁹² EC First Submission, para. 63.

⁹³ In *Brazil Desiccated Coconut*, the Appellate Body recognized this distinction between an initial investigation and the post-investigation phase, noting that the imposition of “definitive” duties (an “order” in U.S. parlance) ends the investigative phase. *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, Report of the Appellate Body adopted 20 March 1997, p. 9.

⁹⁴ *Korea DRAMs*, para. 6.48, n.494.

⁹⁵ Article 11.6 provides as follows: [i]f, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

C. There is No *De Minimis* Standard for Sunset Reviews

70. The focus of a sunset review under Article 21.3 is future behavior, *i.e.*, the likelihood of continuation or recurrence of subsidization – not whether or to what extent subsidization currently exists. The analysis is perforce predictive. Under these circumstances, mathematical certainty or precision as to the exact amount of likely future subsidization is not necessarily practicable and certainly not required.⁹⁶

71. Under Article 11.9, Members must apply a one percent *de minimis* standard in countervailing duty *investigations*.⁹⁷ The EC erroneously argues that the Article 11.9 *de minimis* standard is applicable in sunset reviews under Article 21.3.⁹⁸ Nothing in Article 21.3 or elsewhere in the Agreement sets a *de minimis* standard for sunset reviews. Furthermore, a contextual analysis of Article 21.3, in light of the object and purpose of the SCM Agreement and the particular provisions at issue, provides no support for the EC's claim.

⁹⁶ See, e.g., *Korea DRAMs*, para. 6.43 (discussing prospective analysis, albeit in the context of a different type of review). Although there is no requirement to quantify the amount of subsidization likely to continue or recur, the United States does so under its domestic law. Commerce transmits this information to the USITC, which has the option of considering the magnitude of the net countervailable subsidy when it analyzes the likelihood of continuation or recurrence of injury.

⁹⁷ The text of Article 11.9 reads in relevant part:

An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis*, or whether the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered *de minimis* if the subsidy is less than 1 per cent *ad valorem*.

As the EC notes, correctly, the United States applies a one percent *de minimis* standard in countervailing duty investigations pursuant to section 703(b)(4)(a) of the Act (19 USC 1675a(b)(4)(B)). See EC First Submission, para. 103.

⁹⁸ As discussed above, the Commerce determination at issue in this case involves likelihood of continuation or recurrence of *subsidization*. The EC has not challenged the USITC's determination concerning likelihood of continuation or recurrence of *injury*.

1. Nothing in Article 21.3 or Elsewhere in the Agreement Sets a *De Minimis* Standard for Sunset Reviews

72. Nothing in the text of Articles 11.9 or 21.3 requires application of the Article 11.9 one percent *de minimis* standard in Article 21.3 sunset reviews, or any other type of review. In particular, there is no reference in Article 21.3 to a *de minimis* standard and the text of Article 11.9 makes no reference to Article 21.3.

73. The report in *Korea DRAMs* is instructive. In that case, Korea argued that the *de minimis* standard in Article 5.8 of the AD Agreement⁹⁹ applied to reviews as well as to investigations. Article 5.8 of the AD Agreement is the parallel provision to Article 11.9 of the SCM Agreement.¹⁰⁰ The panel rejected Korea's arguments, finding that "the term 'investigation' [used in the context of Article 5.8] means the investigative phase leading up to the final determination of the investigating authority."¹⁰¹ Thus, the *Korea DRAMs* panel found no textual or contextual support for Korea's claim that the *de minimis* standard applied beyond the investigative phase.

74. The EC's argument is not only devoid of support in the text of the SCM Agreement, it also fails to mention, much less reconcile, its position with relevant language in the text. Specifically, note 52 of Article 21.3 provides that "a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty." Thus, the current level of subsidization is not decisive as to whether subsidization is likely to recur. The EC's claim that a *de minimis* standard is required in the context of Article 21.3 sunset reviews would render note 52 meaningless.¹⁰²

75. The EC would also have the panel read into the use of the word "subsidization" in Article 21 an implicit reference to Article 11.9 because authorities must terminate an investigation if the amount of the subsidy is *de minimis*.¹⁰³ However, nothing in the word "subsidization", as defined in the SCM Agreement implies anything about a *de minimis* standard.

⁹⁹ Article 5.8 of the AD Agreement is the parallel provision to Article 11.9 of the SCM Agreement. The only substantive difference between the two (other than the use of terminology appropriate to the different Agreements), is that the *de minimis* standard under Article 5.8 is two percent versus one percent under Article 11.9.

¹⁰⁰ The only substantive difference between the two (other than the use of terminology appropriate to the different Agreements), is that the *de minimis* standard under Article 5.8 is two percent versus one percent under Article 11.9.

¹⁰¹ *Korea DRAMs*, para. 6.87.

¹⁰² As is well established under WTO jurisprudence, an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. *See, e.g., United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, p.15.

¹⁰³ EC First Submission, para. 114.

The term “subsidization” simply means the existence of a subsidy as defined in Article 1 of the SCM; Article 1 contains no *de minimis* standard.¹⁰⁴

76. In sum, giving the text of the Agreement its ordinary meaning, the only conclusion one can reach is that there is no obligation to apply the Article 11.9 *de minimis* standard in an Article 21.3 sunset review.

2. A Contextual Analysis of Article 21.3, Considering the Object and Purpose of the SCM Agreement and the Particular Provisions at Issue, Provides No Support for the EC’s *De Minimis* Claims

77. As noted above, Article 31 of the *Vienna Convention* provides that the words of a treaty must be interpreted according to their “ordinary meaning” taking into account their “context” and the “object and purpose” of the agreement. However, while recourse to consideration of context and object and purpose is an aid to interpretation, it cannot override the plain meaning of the text.¹⁰⁵

78. As discussed above, the EC has essentially bypassed any discussion of the ordinary meaning of the text of Articles 11.9 and 21.3, and the Panel need go no further than the above textual and contextual analysis to conclude that the EC’s *de minimis* claim is without merit. Nevertheless, we demonstrate below that the EC’s arguments concerning the object and purpose of Article 21.3 also fail to overcome the obvious lack of any textual support for their claim.

79. Citing *UK Lead Bar*, the EC argues that the object and purpose of the sunset review mechanism set forth in Article 21.3 is “to ensure that the only countervailing duties imposed are those which are necessary to counteract subsidization that is likely to cause injury if the duty were to expire.”¹⁰⁶ According to the EC, sunset reviews therefore are equivalent to investigations because they require the investigating authority “to demonstrate that the conditions for *imposing* countervailing measures would still be present, in the absence of the duty”.¹⁰⁷ The EC concludes this line of reasoning with the argument that only a subsidy level of less than the Article 11.9 one

¹⁰⁴ In *UK Lead Bar*, the Appellate Body considered the investigating authority’s finding on “subsidization, i.e., whether or not a subsidy continues to exist”, in light of the definition of subsidy in Article 1. *UK Lead Bar*, paras. 53-55, 61-63.

¹⁰⁵ As the Appellate Body has recognized, a “treaty’s ‘object and purpose’ is to be referred to in determining the meaning of the ‘terms of the treaty’ and not as an independent basis for interpretation.” *Japan Taxes*, p.11, n.20.

¹⁰⁶ EC First Submission, para. 113. On the way to reaching its claims concerning Article 21.3, the EC makes interim arguments concerning the applicability of the Article 11.9 *de minimis* standard to reviews under Article 21.2. Although not a claim properly before this Panel, the United States would note that the EC’s arguments concerning Article 21.2 fail for, *inter alia*, the same reasons they fail with respect to Article 21.3.

¹⁰⁷ EC First Submission, para. 113 (emphasis in original).

percent *de minimis* standard is presumed not to cause injury and, therefore, it is “logically and legally unavoidable to conclude” that the same *de minimis* standard is applicable in a sunset review.¹⁰⁸

80. The EC completely ignores the fundamental difference between investigations, in which a *de minimis* standard is required under Article 11.9, and sunset reviews. In the context of Article 11.9, the function of the *de minimis* test is to determine whether foreign government subsidies warrant the imposition of a countervailing duty order in the first instance. For example, in an investigation, if the investigating authority found that a government program had provided recurring subsidies at a rate of more than one percent, imposition of a countervailing duty would be warranted if the subsidized imports were found to cause injury.

81. In contrast, the focus of the sunset review is the future. The mere continued existence of this same program could warrant maintaining the duty beyond the five-year point, *even if* the amount of the subsidy was currently *zero*, as stated in footnote 52, because subsidization may be likely to recur absent the discipline of the duty. This distinction between the object and purpose of an investigation and the object and purpose of a sunset review supports the conclusion that, absent an express reference to the contrary, there is no basis to assume or infer an intent that the *de minimis* standard for investigations applies in sunset reviews.

3. The United States’ *De Minimis* Standard Is Not Evidence of Any Obligation in the SCM Agreement

82. In an attempt to bolster its non-existent textual argument, the EC cites the fact that the United States applies a *de minimis* standard in sunset reviews as “confirmation” of the requirement to apply a *de minimis* rule in the context of Article 21.3 sunset reviews.¹⁰⁹ In addition, the EC argues that, given the provisions of Article 32.4, it had a “reasonable and legitimate expectation” that the United States would terminate the duty.¹¹⁰ The EC is wrong on both accounts.

83. The United States’ *de minimis* “practice” is legally irrelevant. As demonstrated above, there is no *de minimis* standard in sunset reviews. Thus, Members are free to determine what, if any, *de minimis* standard they will apply. Nothing in the SCM Agreement prevents Members from establishing procedures that are not required by the Agreement, as long as those procedures do not conflict with the obligations they have assumed under the Agreement. Because Members may chose to go beyond their obligations under the Agreement, their domestic law has no bearing on an analysis of what the Agreement requires.

¹⁰⁸ EC First Submission, para. 115.

¹⁰⁹ EC First Submission, para. 117.

¹¹⁰ EC First Submission, para. 119.

84. Furthermore, while Article 31.3(b) of the *Vienna Convention* permits consideration of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” policy decisions made by one Member for purposes of its domestic legislation do not constitute “subsequent practice” within the meaning of Article 31.3(b).¹¹¹

85. Finally, whether the EC’s expectations with respect to Articles 32.4 and 21.3 were “legitimate” can only be considered by applying the customary rules of treaty interpretation. The EC’s expectations, like the expectations of all Members, are reflected in the SCM Agreement itself. As the Appellate Body has stated:¹¹²

The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these *principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.*

86. Thus, the EC’s only legitimate expectations with respect to Articles 32.4 and 21.3 are those reflected in the Agreement itself. The EC has no basis to “expect” a particular outcome or interpretation if that was not what was negotiated. As demonstrated above, an analysis of the text, context and object and purpose of Article 21.3 reveals no support for the EC’s arguments that a *de minimis* standard is applicable in sunset reviews, let alone the particular *de minimis* standard suggested by the EC. Furthermore, Article 32.4 merely sets an “imposition” date for existing (*i.e.*, pre-WTO Agreement) countervailing measures for purposes of determining when the five-year mark established in Article 21.3 has been reached.¹¹³ As such, the EC’s

¹¹¹ See *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, Report of the Panel adopted 30 October 1995, para. 497 (“The practices of three of the total signatories to an Agreement did not constitute subsequent practice in the application of the treaty in accordance with Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*.”).

¹¹² *India Patent Protection*, para. 45 (emphasis added). In a similar vein, the Appellate Body has stated as follows: “The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intention of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined ‘expectations’ of *one* of the parties to a treaty.” *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, Report of the Appellate Body adopted 22 June 1998, para. 84 (italics in original).

¹¹³ Article 32.4 states: “For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date included a clause of

“expectation” that the United States would terminate the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany has no basis in the Agreement.

87. In sum, applying customary rules of treaty interpretation, the Panel should find that there is no *de minimis* standard for sunset reviews in the SCM Agreement and, therefore, the United States’ application of a 0.5 percent *de minimis* standard in sunset reviews does not constitute a violation of its obligations under the SCM Agreement.

D. Commerce Properly Determined That the Expiry of the Countervailing Duty Order Would Be Likely to Lead to Continuation or Recurrence of Subsidization Based Upon An Appropriately Conducted Review of All Relevant and Properly Submitted Facts

88. Article 11 of the DSU directs panels to make an “objective assessment” of the facts of the case and of the applicability and conformity with the relevant covered agreements. With regard to fact-finding, “the applicable standard is neither *de novo* review as such, nor ‘total deference.’”¹¹⁴ This standard applies to all obligations under GATT 1994 and the SCM Agreement.¹¹⁵

89. There appears to be no dispute that the provisions governing sunset reviews are found in Article 21 of the SCM Agreement, and in Article 21.3 in particular. Article 21.3 establishes that in the context of the sunset review, Commerce was obligated to determine whether expiry of the countervailing duty would be likely to lead to continuation or recurrence of subsidization. Furthermore, by virtue of Article 21.4, in making its sunset determination, Commerce was obligated to apply the evidentiary and procedural requirements of Article 12.

90. Thus, an “objective assessment” of Commerce’s actions, pursuant to Article 11 of the DSU, would focus on the consistency of the sunset review with the requirements of Articles 21.3 and 12.

91. As demonstrated above, the United States’ automatic self-initiation of sunset reviews and its application of a particular *de minimis* standard do not breach any provision of the SCM Agreement. The remaining claims raised by the EC concern Commerce’s findings in the sunset determination at issue. To a substantial degree, these remaining claims reflect a misunderstanding of the standard of review. As we discuss below, a great deal of argumentation

¹¹³ (...continued)

the type provided for in that paragraph.” As discussed above, the United States’ countervailing duty law did not include provisions for conduct of sunset reviews prior to 1995.

¹¹⁴ *EC Hormones*, para. 116, n.111.

¹¹⁵ *UK Lead Bar*, para.51.

simply presents another view of the facts, rather than a showing that the findings made, or the procedural actions taken, by Commerce were in any way inconsistent with the SCM Agreement or unsupported by the evidence. Such argumentation improperly seeks to have the Panel make its own *de novo* interpretation of the record.¹¹⁶ The EC's claims with respect to procedural and evidentiary defects are not supported by the facts in this case.

1. Commerce Properly Determined That Expiry of the Order Would Be Likely to Lead to Continuation or Recurrence of Subsidization

92. As a starting point for making its likelihood determination in the sunset review, Commerce considered the countervailable subsidies and programs used, and the amount of the subsidy determined, in the original investigation. As explained in Commerce's preliminary sunset determination, the rationale for this approach is that the findings in the original investigation provide the only evidence reflecting the behavior of the respondents without the discipline of countervailing measures in place.¹¹⁷ This approach makes sense given that, in a sunset review under the Article 21.3, an authority is considering whether, without the discipline of the duty, subsidization would likely continue or recur, *i.e.*, what would happen without the discipline of the order.

93. In the original investigation, Commerce determined that German producers of corrosion-resistant steel benefitted from five different subsidy programs.¹¹⁸ In the sunset review, Commerce made the following findings with respect to these five programs:¹¹⁹

1. Capital Investment Grants ("CIG"). The benefit streams from non-recurring grants will continue beyond the five-year mark.
2. Structural Improvement Aids. The program has been terminated.
3. Special Subsidies for Companies in the Zonal Border Area. The program has been terminated.
4. Aid for Closure of Steel Operations. The program continues to exist.

¹¹⁶ Moreover, in one instance, the EC goes further and seeks to present to the Panel evidence properly rejected by Commerce to refute Commerce's findings. As demonstrated below, the document is not relevant to the Panel's deliberative process. However, even if *post hoc* consideration of this document were appropriate (and the United States does not concede this point), the contents of the document (Exhibit EC-20) could not, and do not, support the EC's claims with respect to the CIG program.

¹¹⁷ *Commerce Sunset Preliminary Decision Memorandum*, p.37 (Exhibit EC-7).

¹¹⁸ *Commerce Investigation Final*, 58 FR at 37316-21 (see discussion of programs in fact section above).

¹¹⁹ *Commerce Sunset Preliminary Decision Memorandum*, pp.24-29 (Exhibit EC-7); *Commerce Sunset Final Decision Memorandum* (Exhibit EC-10).

5. ECSC Redeployment Aid Under Article 56(2)(b). The program continues to exist.

94. Commerce also found that two additional subsidy programs which were found to provide a zero-benefit to corrosion-resistant products in the period of investigation still existed: ECSC Article 54 Long-Term Loans, and Interest Rebates on ECSC Article 54 Loans.¹²⁰

95. Significantly, the EC has not disputed or disproved these findings. With respect to Aid for Closure of Steel Operations and the various ECSC programs, the Government of Germany admitted in the case below, that the programs were not scheduled for termination until 2002, when the ECSC Treaty expires.¹²¹ With respect to the CIG program, the EC itself concedes the continued existence of some benefits.¹²²

96. As an initial matter, therefore, it was reasonable for Commerce to find likelihood given the continued existence and availability of countervailable subsidy programs previously found to have been used by German producers of corrosion-resistant steel and the continuation of benefit streams from grants under the CIG program.

2. Commerce Properly Found Likelihood of Continuation of Benefits From the CIG Program

97. Although the EC essentially concedes the continued existence of some benefits from the CIG program, it claims that Commerce should have considered the program terminated without residual benefits to the German producers.¹²³ According to the EC, using the 15-year allocation period determined in the original investigation, the subsidy rate for the remaining benefits would be well below *de minimis*.¹²⁴

98. Commerce's methodology for the allocation of non-recurring benefits to a particular time period is found in the *CVD Final Rule* at section 351.524.¹²⁵ This provision provides that non-recurring benefits will normally be allocated to a firm over a number of years based on the average useful life of renewable physical assets and that Commerce will use a "declining balance" formula to determine the amount of subsidization to be allocated in each period. The

¹²⁰ *Commerce Sunset Preliminary Decision Memorandum*, p.29 (Exhibit EC-7); *Commerce Sunset Final Decision Memorandum* (Exhibit EC-10). In the investigation, Commerce determined that long-term loans under ECSC Article 54 had been provided to German producers of corrosion-resistant carbon steel flat products, Hoesch, Preussag, and Thyssen; Commerce also determined that Preussag and Thyssen received interest rebates ECSC Article 54 loans. See *Commerce Investigation Final*, 58 FR at 37316-21 (Exhibit EC-2).

¹²¹ See *Commerce Sunset Preliminary Decision Memorandum*, p.29 (Exhibit EC-7).

¹²² EC First Submission, para. 83.

¹²³ EC First Submission, para. 83.

¹²⁴ EC First Submission, para. 85.

¹²⁵ Exhibit EC-14.

EC description of Commerce's methodology is correct generally except that it omits one important item.¹²⁶

99. The EC correctly concludes that Commerce's "declining balance" methodology "results in the amount countervailed always declining year by year."¹²⁷ Thus, the absolute subsidy amount towards the end of the allocation period will be lower than that at the beginning. However, while the EC may be correct that the absolute amount of the subsidy declines over time, the calculated *ad valorem* rate could rise or decline depending on changes in the formula's denominator (*i.e.*, the relevant sales - total sales, export sales, sales of a particular product, or sales to a particular market).

100. Specifically, a subsidy rate is derived by dividing a numerator – the subsidy benefit properly attributable to the subject merchandise – by a denominator – the value of the sales of the merchandise at issue (in the case of a domestic subsidy). Even if one knows the benefit is amortizing downward and even if one knows that no new subsidies were awarded, there are still issues of changes in the sales volume likely to occur once the order is lifted, whether subsidies will be tied to particular products, *etc.* Consequently, without knowing the sales volume, the *ad valorem* subsidy rate for any period cannot be determined despite the use of a "declining balance" methodology generally .

101. In other words, the EC relies only on routine amortization to claim that any residual benefits in the future will be small. Yet the EC's argument is based on a factual assumption that sales volumes will remain constant. Because there is no basis for such an assumption, the EC's argument fails as a factual matter.

102. The EC's amortization arguments, furthermore, are based in part on a calculation memorandum from the original countervailing duty investigation that is not part of the record considered in the sunset review.¹²⁸ The request to submit this business confidential document was untimely submitted and Commerce properly declined to consider it.

103. Specifically, the German producers sought to have the document in question placed on the record over six months after the deadline for filing required and optional information. At no time did the German producers request an extension of this deadline. Furthermore, even if the request to place the document on the record is considered as an extension request, it still came over halfway through the sunset review and, in particular, after Commerce's preliminary sunset determination. The untimeliness of the German producers' request is all the more obvious given that they were on notice of the information requirements and applicable deadlines by May 1998

¹²⁶ EC First Submission, paras. 92-93.

¹²⁷ EC First Submission, para. 92.

¹²⁸ Exhibit EC-20.

and, as such, had *over 15 months* to gather and prepare a submission, including required and optional information, by the time the sunset review was initiated on September 1, 1999.

104. The German producers' request to submit this document also implicated Commerce's rules concerning treatment of confidential information ("business proprietary information" or "BPI" in U.S. parlance). Pursuant to U.S. law, release of that information is not permitted without the consent of the person that submitted it.¹²⁹ Commerce could not ignore previous requests for confidential treatment and automatically place this information from the original 1993 investigation on the record of the sunset review. Further, other parties without prior access to the document¹³⁰ would have been prejudiced by its untimely inclusion on the record.

105. Under these circumstances, Commerce did not consider it practicable or appropriate to consider the document. Commerce's decision to enforce procedural rules governing deadlines for submission of evidence and the release of confidential business information was proper and consistent with Article 12. As such, the Panel should find that Commerce appropriately declined to consider the information and that it is not this Panel's role to consider evidence which could have been timely presented to the decision maker but was not.¹³¹

106. Furthermore, even if the Panel should consider the document, it does not prove the EC's arguments. The calculation memorandum only provides the absolute subsidy amounts (*i.e.*, the numerator) – it does not shed any light on the value of the sales of the merchandise at issue (*i.e.*, the denominator). As demonstrated above, without a denominator, there is no way to calculate the *ad valorem* subsidy rate.

107. In sum, as a matter of law, the EC has not pointed to any provision of the SCM Agreement that requires Commerce to consider the magnitude of subsidization to evaluate the likelihood of continuation or recurrence of subsidization.¹³² Furthermore, as the Appellate Body

¹²⁹ See sections 777(b)-(c) of the Act. U.S. law in this regard is consistent with Article 12.4 of the SCM Agreement ("[Confidential] information shall not be disclosed without the specific permission of the party submitting it" (footnote omitted)).

¹³⁰ For example, although domestic producers would have had access to the document during the 1993 investigation under an administrative protective order, they would have to destroy it after the investigation in order to comply with the requirements of the BPI provisions of the law.

¹³¹ See, e.g., *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS/184/AB/R, Report of the Appellate Body adopted 23 August 2001, paras. 73-75 (discussing parallel provisions in the AD Agreement, the Appellate Body agreed that authorities may impose appropriate time limits for responses to questionnaires).

¹³² The EC also asserts that Commerce should have considered the circumstances concerning the CIG program to be a program-wide change as envisioned by section 752 of the Act and, thus, should have considered these circumstances in the sunset review. EC First Submission, para. 89. The fact that Commerce did not consider the circumstances of the CIG program to constitute a program-wide change as envisioned by section 752, while an

in *UK Lead Bar* recognized, the benefit from a non-recurring subsidy continues to flow.¹³³ As a matter of law, then, benefits from a non-recurring subsidy (such as those from the CIG program) that continue to flow constitute evidence of “continuation” of subsidization. Consistent with this ruling and Article 21.3, Commerce properly considered that the existing benefit streams from the CIG programs constituted evidence of the “continuation” of subsidization. Given that the evidence on the record of the sunset review shows (as the EC admits) that benefits continue to flow from the CIG program, Commerce properly found likelihood of continuation of subsidization.

3. Commerce’s Sunset Review Complied With the Evidentiary and Procedural Requirements of Article 12

108. As discussed above, an “objective assessment” of Commerce’s actions pursuant to Article 11 of the DSU would focus on the consistency of the sunset review and determination with the applicable requirements of the Agreement. As demonstrated below, Commerce’s evidentiary and procedural actions were consistent with Article 12 of the SCM Agreement.

109. There is no dispute that, based on Article 21.4, the provisions of Article 12 on evidence and procedure apply to sunset reviews. Article 12.1 requires domestic authorities to give interested Members and parties an ample opportunity to present in writing all evidence which they consider relevant to the proceeding. The facts do not support the EC’s claims that Commerce failed to do so.¹³⁴

110. First, the *Sunset Regulations* describe specifically the information required to be provided by all interested parties in a sunset review,¹³⁵ *i.e.*, they constitute the standard questionnaire. In addition, the *Sunset Regulations* specifically invite parties to submit, with the required information, “any other relevant information or arguments that the party would like [Commerce]

¹³² (...continued)

issue that could be raised before domestic court, does not constitute a violation of Article 21.3 or the SCM Agreement. In addition, the EC observes that U.S. law provides that Commerce “normally” will choose a net countervailable subsidy from the original investigation when determining the net countervailable subsidy that is likely to prevail if the order is revoked, but that Commerce is not prohibited from making adjustments to this rate. EC First Submission, para. 91. Indeed, Commerce did make adjustments in the sunset review to this rate for programs which were determined to be terminated and which did not have a benefit stream which continued after the sunset review. *See* Sunset Calculation Memorandum, p.1 (Exhibit EC-1). The EC’s objection that Commerce did not make all the adjustments under section 752 or other provisions of U.S. law again does not constitute a violation of Article 21.3.

¹³³ *UK Lead Bar*, para. 62.

¹³⁴ EC First Submission, para. 99.

¹³⁵ *See* 19 CFR 351.218(d)(1)-(4) (Exhibit EC-14).

to consider.”¹³⁶ The EC and the German producers were on notice of these information requirements and options over 15 months ahead of the scheduled date for initiation of the sunset review.

111. Second, consistent with Article 12.1.1, the *Sunset Regulations* provide 30 days for parties to submit the required information. Also consistent with Article 12.1.1, Commerce’s regulations provide for extensions of time to meet regulatory deadlines, such as a response in a sunset review.¹³⁷ In fact, the sunset review initiation notice specifically mentions this extension provision.¹³⁸ As with respect to the sunset information requirements, the EC and the German producers were on notice of the applicable deadlines over 15 months ahead of the scheduled date for initiation of the sunset review. Notably, they did file their substantive response and rebuttal comments consistent with these deadlines.

112. Yet over six months after the deadline for responding to the sunset questionnaire and submitting optional information, the German producers attempted to place new factual information on the record. The EC asserts that Commerce’s rejection of these untimely submissions was contrary to their “right” under the SCM Agreement to have an “ample opportunity to present in writing all evidence which they consider relevant in respect of the sunset review.”¹³⁹ Specifically, they point to the German producers’ March 14 and 17 submissions and the producers’ April 13 request to Commerce that a confidential calculation memorandum from the original investigation be placed on the record.¹⁴⁰

113. As discussed above, as a factual matter, the German producers and the German Government had ample time to submit factual information in the sunset review.

114. As a legal matter, the EC’s claims concerning this information also fail.

115. Specifically, Article 21.1.1 of the SCM Agreement requires that parties be given at least 30 days to respond to a questionnaire. Furthermore, Article 21.1.1 requires that due consideration be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable. Commerce’s filing deadlines and its decision not to accept late-filed information fully comport with its obligations under Article 12.

¹³⁶ 19 CFR 351.218(d)(3)(iv)(B) (Exhibit EC-14).

¹³⁷ 19 CFR 351.302.

¹³⁸ See *Sunset Initiation* (Exhibit EC-5).

¹³⁹ EC First Submission, para. 99.

¹⁴⁰ EC First Submission, paras. 96-97.

116. First, there is no dispute that the German producers had 30 days to respond to the questionnaire. Second, Commerce's rejection of the German producers late-filed information was reasonable under the circumstances of this case, *i.e.*, the German producers attempted to file new factual information over six months after Commerce's deadline. Although an authority "should" grant extensions "whenever practicable", nothing required Commerce to find that it was practicable to accept and consider documents filed six months late, particularly given the fact that the EC and the German producers had over 15 months to gather any data they considered appropriate and to prepare their submission of required and optional information.

117. The EC also argues that Commerce arbitrarily applied its regulation to submissions of the German producers because it accepted a submission from the U.S. producers dated April 28 and portions of a German government submission of April 18.¹⁴¹ The EC's argument ignores relevant factual distinctions between the submissions from the German producers rejected by Commerce and those submissions from the U.S. producers and the German Government that were accepted by Commerce.

118. In accepting the U.S. producers' submission, Commerce considered that the submission contained the public version of Preussag's questionnaire response from the original investigation and the U.S. producers had submitted the document because the German producers had cited to the questionnaire response in one of their submissions prior to the deadline for factual information without submitting the document itself.¹⁴² Commerce also accepted portions of the German Government's April 18 submission. However, Commerce only accepted those portions of the German Government's submission that were part of the original investigation, contained no new factual information, and were publicly available.¹⁴³ None of the information accepted by Commerce in this instance was confidential information that would have been unavailable to other parties such as the U.S. producers.

119. These submissions are not comparable to the submissions of the German producers. The German producers attempted to include a confidential calculation document for the first time in their case brief near the conclusion of the proceeding. Unlike the accepted submissions of the U.S. producers and the German Government, this document contained new factual information not previously available to all parties.

120. The EC also suggests that if Commerce grants one respondent any concession, it must then waive all its deadlines and confidentiality rules at the convenience of any respondent.¹⁴⁴ There is no support for this interpretation of the evidence requirements in Article 12.

¹⁴¹ EC First Submission, para. 100.

¹⁴² *Commerce Sunset Final Decision Memorandum*, p.24-26 (Exhibit EC-10).

¹⁴³ *Commerce Sunset Final Decision Memorandum*, p.41 (Exhibit EC-10).

¹⁴⁴ EC First Submission, para. 100.

Furthermore, accepting the belated submission of a *public* document differs greatly from belatedly placing a confidential document in the record, because all parties have always had access to public information.

121. In sum, the Panel should dismiss the EC's claims with respect to treatment of evidence. Commerce followed reasonable, appropriate procedures that fully comply with the evidentiary and procedural requirements of Articles 21 and 12.

E. The Panel Should Make a Preliminary Ruling that the EC's Claims Regarding the Expedited Sunset Review Procedure Are Not Within the Panel's Terms of Reference

122. The United States requests that the Panel make a preliminary ruling that the EC's claims regarding the U.S. expedited sunset review procedure are not properly before the Panel, because this procedure is not a measure within the Panel's terms of reference.¹⁴⁵ Not until its first written submission to the Panel did the EC ever give any indication that it was complaining about this procedure.

123. In its initial request for consultations, the EC identified Commerce's determination in the *full* sunset review of the countervailing duty order on certain corrosion-resistant carbon steel flat products from Germany as the challenged measure, alleging that Commerce's determination is inconsistent with Articles 10, 11.9 and 21 of the SCM Agreement.¹⁴⁶ The EC did not allege that any other Commerce sunset determination or procedure violated U.S. WTO obligations. Likewise, at the consultations which took place on December 8, 2000, the parties did not discuss the expedited sunset review procedure.

124. In its second request for consultations, the EC identified Commerce's *procedures for initiation* of sunset reviews, both as applied by Commerce in the sunset determination in question and in general, as an additional challenged measure, alleging that such initiation procedures are inconsistent with Articles 21.1, 21.3 and 32.5 of the SCM Agreement and Article XIV:4 of the Marrakesh Agreement. The EC did not allege that any other sunset determination or procedure violated U.S. WTO obligations. At the consultations which took place on March 21, 2001, the parties did not discuss the expedited sunset review procedure.

125. Similarly, in the EC's request for the establishment of a panel, there is no mention of the expedited sunset review procedure.¹⁴⁷ Instead, the only measures identified by the EC are: (1) the sunset determination on certain corrosion-resistant carbon steel flat products from Germany;

¹⁴⁵ These claims are set forth in the EC First Submission, paras. 57-61, 125.

¹⁴⁶ WT/DS21 3/1 (20 November 2000).

¹⁴⁷ WT/DS21 3/3 (10 August 2001).

(2) the initiation of sunset reviews by Commerce; and (3) the *de minimis* standard employed by Commerce in sunset reviews.

126. Nonetheless, in its First Submission, the EC, for the first time in this dispute, raises the expedited sunset review procedure as a measure which it alleges violates the SCM Agreement. Articles 4.7 and 6.2 of the DSU preclude the EC's claims with respect to the expedited sunset review procedure, because the EC never identified this procedure as a measure in its consultation requests, in the consultations themselves, or in its panel request. In particular, it is well-established that a complaining party cannot add new measures after a panel's terms of reference have been established.¹⁴⁸

VI. CONCLUSION

127. For the reasons set out in this submission, the United States respectfully requests that the Panel make the following findings:

- (1) The U.S. procedure for the automatic self-initiation of sunset reviews by Commerce is not inconsistent with the SCM Agreement;
- (2) In not applying the 1 percent *de minimis* standard of Article 11.9 of the SCM Agreement to sunset reviews, the United States has not acted inconsistently with its obligations under the SCM Agreement;
- (3) The Commerce sunset review determination in certain corrosion-resistant carbon steel flat products from Germany is not inconsistent with United States obligations under the SCM Agreement.

128. In addition, the United States respectfully requests that the Panel make a preliminary ruling that the EC's claims with respect to the expedited sunset review procedure are not within the Panel's terms of reference.

¹⁴⁸ See, e.g., *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, Report of the Panel adopted 23 July 1998, para. 14.3. Even if one were to somehow construe the EC's general reference to U.S. statutory and regulatory provisions as having satisfied the requirement to identify the expedited sunset review procedure as a measure being challenged, the EC panel request still would run afoul of the obligation in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The EC's panel request does not even identify the expedited sunset review procedure as a problem, let alone present the "problem" clearly. And, as noted, this procedure was not mentioned in the EC's two consultation requests, nor was it discussed at the consultations.

U.S. Exhibit List

<u>Number</u>	<u>Document</u>
1	<i>Sunset Initiation Schedule</i>
2	Letters from Commerce to Interested Parties
3	Commerce Memorandum on Adequacy of Response to Notice of Initiation